

# FYI<sup>®</sup> Alert

## For Your Information<sup>®</sup>

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## No Further Delay for Fiduciary Rule (for Now) – but DOL Implements Enforcement Lite Approach

DOL announced that it will not at this point further delay its fiduciary rule June 9 applicability date. While it will focus on compliance assistance rather than enforcement through January 1, 2018, as of June 9, 2017, participants can bring class action lawsuits against fiduciaries under the final rule.

### Background

In April, the DOL delayed by 60 days the applicability date for its “fiduciary rule” that expanded the scope of the definition of fiduciary for employer-sponsored plans as well as non-ERISA investment vehicles like IRAs and health savings accounts. (See our *FYI Alert* from [April 5, 2017](#).) It also delayed the written disclosures and fiduciary representations under the revised prohibited transaction exemptions to create a phased implementation/transition period until the January 1, 2018 full compliance deadline.



Many stakeholders advocated for an additional extension, hoping that the confirmation of Labor Secretary Alexander Acosta would prompt action on President Trump’s February 3, 2017 directive to re-evaluate the effect of the rule and its likely impact on retirement savings efforts. (See our [February 6, 2017 FYI Alert](#)).

### Acosta Says No Can Do

In a May 22, 2017 *Wall Street Journal* opinion column, Acosta stated that there is “no principled legal basis to change the June 9 date” while the DOL re-evaluates the rule in accordance with President Trump’s directive by seeking additional public input and considering the merits of a further delay or a change. Specifically, he concluded that the Administrative Procedures Act did not allow for postponement of the applicability date without another round of public comment on a proposal.

## Gentle Enforcement and FAQs

Along with Acosta's comments, DOL released [Field Assistance Bulletin 2017-2](#), which explains that DOL will focus on providing compliance assistance during the phased implementation period. In the FAB, DOL instructs its enforcement personnel not to pursue claims against fiduciaries who are working "diligently and in good faith" to comply with the rule and exemptions, or to treat those fiduciaries as violating the rule and its exemptions during the phased implementation period. The guidance also confirmed that, for fiduciaries making this diligent effort, IRS will not apply IRC Section 4975 prohibited transaction excise taxes for any transactions and reporting obligations that DOL's enforcement policy affects. DOL said it will consider additional temporary relief to the extent circumstances merit it.

**Comment.** As DOL acknowledged, its enforcement policy does not bar participant lawsuits during the transition period. This means that, as of June 9, 2017, participants can bring class action lawsuits against fiduciaries under the final rule for breaches that occur on or after that date. See our [April 22, 2016 For Your Information](#) for more on the types of scenarios that could lead participants to bring fiduciary breach claims.

DOL also provided [FAQs on the transition enforcement period](#). Q12 lists examples of plan communications to participants about increasing their contributions that the DOL considers informative, rather than fiduciary, in nature. Specifically, DOL clarifies that plans can customize communications to include information about the particular participant's current contribution rate and its impact on projected retirement income, or on the amount of employer matching contribution, of an increase in that rate, without triggering fiduciary status. In these examples, the plan stops short of stating that the participant *should* increase his or her plan contributions.

The other FAQs, to which plan service providers are likely to pay close attention, explain that, under the final rule, advisers and financial institutions must:

- "Give advice that is in the "best interest" of the retirement investor. This best interest standard has two chief components: prudence and loyalty:
  - Under the prudence standard, the advice must meet a professional standard of care as specified in the text of the exemption;
  - Under the loyalty standard, the advice must be based on the interests of the customer, rather than the competing financial interest of the adviser or firm;
- Charge no more than reasonable compensation; and
- Make no misleading statements about investment transactions, compensation, and conflicts of interest."

The FAQs also explain how these standards relate to the prohibited transaction exemptions.

## In Closing

In crafting this rule, the DOL aimed to broaden the scope of fiduciary investment advice – and thereby make it easier for it, and participants, to establish fiduciary liability. Although the DOL's focus on compliance assistance during this transition period is helpful, plan sponsors may still face litigation risk via participant lawsuits. DOL's presidentially directed review could ultimately lead to a rollback or revision of the final rule – but, for the time being, uncertainty remains.

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